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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1078 90

THE TRUST COMPANY OF CHICAGO, Administrator of the Estate of Elizabeth Palmer Smith, Deceased, et al.,

Petitioners,

vs.

CITY OF CHICAGO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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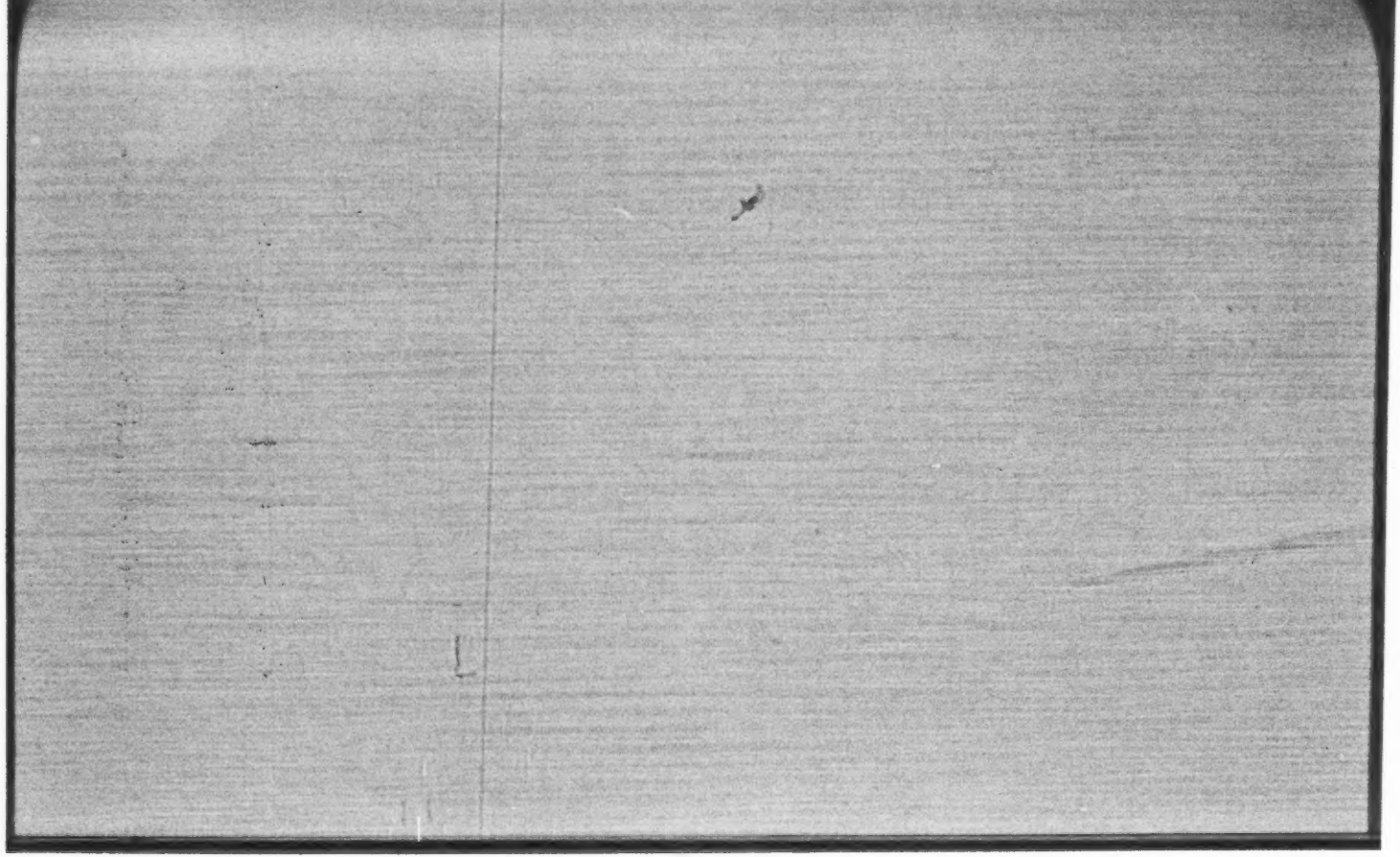
CHAMPLIN-SHEALY COMPANY, CHICAGO 365



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MAY IT PLEASE THE COURT:

The respondents, City of Chicago, et al., oppose the petition for certiorari on the following grounds:

I.

The order of the Supreme Court of Illinois, transferring the case to the Appellate Court of Illinois, is not a final judgment that can be reviewed under Section 237 of the Judicial Code.

The decisions of this Court are so conclusive that the order sought to be reviewed is interlocutory in nature, that we consider that it would be an imposition upon the Court to meet the petition for certiorari on the merits. We shall confine ourselves to pointing out that this Court by its former decisions has established that it has no jurisdiction to entertain a petition for certiorari under the circumstances of this case.

The trial court sustained a demurrer to the complaint and dismissed the suit (Tr. 56). The plaintiffs filed their Notice of Appeal to the Supreme Court of Illinois, which is the court of last resort in that state (Tr. 57). On January 20, 1943, the Supreme Court of Illinois entered the following order (Tr. 61-62):

> "And now on this day the Court having diligently examined and inspected the record and proceedings aforesaid as well as the briefs and argument filed herein, and oral argument by counsel, and now being fully advised in the premises, is of the opinion, find and adjudge that this case was wrongfully appealed to this Court.
>
> "Therefore, it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court of the First District of the State of Illinois, and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the clerk of said Appellate Court.
>
> "And it is further ordered by the Court that the said appellees recover of and from the said appel-

lants costs by them in this behalf expended, to be taxed in due course of administration."

A motion for reconsideration of this order was filed by plaintiffs (Tr. 67-78), which motion was denied on March 9, 1943 (Tr. 78-79).

The petition for certiorari seeks a review of this order transferring the case to the Appellate Court of Illinois. (Petition for certiorari, pp. 1, 3.) The Appellate Court of Illinois is a court of intermediate review and the case has not yet been considered or determined by it in pursuance of the order of transference.

In a situation almost identical to that in the case at bar, so far as procedural aspects are concerned, this Court held that an order of a court of last resort transferring a case to an intermediate appellate court is not final and is not reviewable by this Court.

In *Prudential Insurance Co.* v. *Cheek,* 252 U. S. 567, the Court dismissed for want of jurisdiction a Writ of Error to the Supreme Court of Missouri on the ground that the order of that Court transferring the case to the St. Louis Court of Appeals was not final. Cited in support of the dismissal were *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana,* 226 U. S. 99, 101; *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 255 and *Bruce* v. *Tobin,* 245 U. S. 18, 19. These cases all announce the rule that only final judgments of State Courts are reviewable under Section 237 of the Judicial Code and that the form of the order determines its finality.

A full history of the litigation in *Prudential Insurance Co.* v. *Cheek* is contained in a subsequent report of that case in 259 U. S. 530. The trial court had sustained a demurrer to the petition. Plaintiff declined to plead fur-

ther and appealed to the Supreme Court of the State. That court reversed the judgment and remanded the case for trial.

The ensuing proceedings are described by this Court in 259 U. S. at page 533:

> "* * * the case went to trial and resulted in a verdict in favor of plaintiff upon both counts. Defendant having reserved its constitutional points, appealed from the resulting judgment to the Supreme Court, which, however, refused to take jurisdiction on the ground that all constitutional questions had been decided on the former appeal and that the verdict, being for only $1500, was less than the jurisdictional amount required by statute; and hence transferred the cause to the St. Louis Court of Appeals for final disposition. 209 S. W. 928. Defendant, treating this decision as a final judgment reviewable by writ of error from this court, sued out such a writ, *and upon the ground that the judgment was not final under the state law the cause was dismissed March 8, 1920.* 252 U. S. 567. Thereafter it was submitted to the St. Louis Court of Appeals, which in conformity to the former opinion of the Supreme Court affirmed the judgment (223 S. W. 754), overruled a motion for rehearing and refused an application for certification of the case to the Supreme Court. A writ of error to the St. Louis Court of Appeals followed, under Section 237, Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726." (Italics supplied.)

In view of the foregoing there can be no question that petitioners are prematurely seeking a review of the case by this Court. It is clear that they must first obtain a decision from the Appellate Court of Illinois. That court then has the power to grant a certificate of importance and an appeal to the Illinois Supreme Court. (Section 75, Illinois Civil Practice Act, Ill. Rev. Stats., 1941, chap. 110, par. 199.) If such appeal be granted the Supreme Court will undertake to determine the case and its decision will

then be final and reviewable (assuming affirmance of the trial court's judgment). If an appeal should be denied by the Appellate Court, the losing party has the right to petition the Supreme Court for leave to appeal. (Section 75, Illinois Civil Practice Act, Ill. Rev. Stats., 1941, chap. 110, par. 199.) If the petition for leave to appeal is allowed, the Supreme Court will undertake to decide the case and its decision will then be final and reviewable (assuming affirmance of the trial court's judgment.) If the Appellate Court should affirm the trial court, and refuse to grant an appeal to the Supreme Court and if the Supreme Court should deny leave to appeal (which is tantamount to the situation in *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 230) then the decision of the Appellate Court will be final and reviewable.

At the present stage in the proceedings there is no final judgment "by the highest court of a State in which a decision could be had" and consequently the petition for certiorari has been improvidently filed.

Conclusion.

For the foregoing reasons it is respectfully suggested that the petition for certiorari be dismissed or denied.

Respectfully submitted,

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Corporation Counsel of the
City of Chicago,
Attorney for Respondents.

J. HERZL SEGAL,
Assistant Corporation Counsel,
Of Counsel.